IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 18, Original

UNITED STATES OF AMERICA, Plaintiff,

vs.

STATE OF ARIZONA, Defendant.

RETURN TO RULE TO SHOW CAUSE WHY RESTRAINING ORDER SHOULD NOT ISSUE

In answer to the Rule of this Honorable Court in the above entitled matter directing the defendant to be and appear before it on Monday, February 4, 1935, then and there to show cause, if any it has, why a restraining order should not issue against it as set forth in said rule, the defendant:

1. Files, bound herewith, affidavit of Honorable B. B. Moeur, Governor of the State of Arizona, in which are set forth reasons of defendant for forcibly preventing construction of Parker Dam in the bed of the Colorado River lying east of the thread of the stream.

2. Moves that the Bill of Complaint be dismissed upon the following grounds:

(a) That the facts alleged therein are insufficient to constitute a valid cause of action in equity against the defendant.

(b) That it affirmatively appears upon the face thereof that the United States is not the real party in interest.

(c) That it affirmatively appears upon the face thereof that the Metropolitan Water District of Southern California, a corporation organized under the laws of the State of California, is the real party in interest.

Defendant has filed and bound herewith a brief and argument supporting points advanced in opposition to granting restraining order.

In order that a speedy determination of this controversy may be had, defendant tenders the following stipulation, which, if agreeable to the Court and accepted by the plaintiff, shall be binding upon the parties:

"The United States declares that the plans for Parker Dam make no provision for, nor does the plaintiff intend to provide, facilities by way of locks or otherwise for the convenient passage of commerce by navigation through or around said dam.

The Court may decide this cause on the merits and enter final decree on the Bill, defendant's return to rule to show cause why restraining order should not issue, including motion to dismiss, and affidavits fil-

ed by the parties in support of and in opposition to application for restraining order.

This stipulation is without prejudice to the right of either party to urge any point of law.

This cause may be advanced for argument and set for any day subsequent to the 15th of February, 1935."

JOHN L. SULLIVAN,
Attorney General of Arizona.

JAMES R. MOORE,
Special Assistant Attorney General.
Solicitors for Defendant.

HERMAN LEWKOWITZ
Of Counsel.
February, 1935.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1934

No. 18, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF ARIZONA,
Defendant.

AFFIDAVIT OF B. B. MOEUR, GOVERNOR OF ARIZONA, IN OPPOSITION TO THE APPLICATION FOR RESTRAINING ORDER

STATE OF ARIZONA
County of Maricopa } ss.

B. B. MOEUR being first duly sworn, deposes and says:

I am and at all times since January, 1933, have been the duly elected, qualified and acting Governor of the State of Arizona and make this affidavit for and on behalf of the State of Arizona as defendant in the above entitled cause.

I am advised and believe and, therefore, state the proposed Parker Dam, mentioned in the Bill of Complaint and affidavits herein, is attempted to be constructed by the Honorable Secretary of the Interior of the United States pursuant to an agreement heretofore entered into between the United States and the Metropolitan Water District of Southern California under date of February 10, 1933, commonly referred to as "The Co-operative Contract for Construction and Operation of Parker Dam", under which the United States of America, acting through its then Honorable Secretary of the Interior, undertook to build said dam at the cost of said District, the necessary funds for the construction thereof to be advanced by said District to the United States as might be required.

I am advised and believe that said contract of February 10, 1933, was and is wholly unauthorized by law and was entered into between the then Secretary of the Interior without any authority or warrant of law whatsoever.

I am advised and believe that in attempting to construct said Parker Dam, the Secretary of the Interior is acting as Contractor for the Metropolitan Water District of Southern California.

I am further informed and believe that the State of Arizona as a sovereign State of the United States has sovereign and property rights in the bed, banks and waters of the Colorado River and as trustee for its people is under a legal duty to protect such rights,

and that the State of Arizona as such sovereign owns the bed, banks and waters of the Colorado River and has a duty to maintain the navigability of said stream. That the only duty, authority or jurisdiction of the United States, or its officers, over the Colorado River at the site of the proposed Dam is to regulate it or improve it in aid of navigation. That the proposed Parker Dam is not in aid of navigation, but destructive thereof and if constructed will completely block navigation on said stream at said point.

I am informed and believe that if the Colorado River is to be abandoned as a navigable stream, that sole jurisdiction thereover will revert to the States in which it flows; that so long as it remains a navigable stream the joint consent of the United States, expressed through an act of Congress, and of the State of Arizona, expressed through an act of its Legislature, is necessary for the authorization of the construction of an obstruction to the navigability thereof by or for the Metropolitan Water District of Southern California, or anyone else.

I am informed and believe that the construction of the Parker Dam has not been authorized by the Congress of the United States. Such construction has not been authorized by the Legislature of the State of Arizona.

I deny that the State of Arizona has made any effort to prevent the development of the Colorado River basin, but I admit that the State of Arizona pursuant to legal advice in the case of *Arizona v. California*,

283 U. S. 423, opposed and questioned the legal authorization of Boulder Dam.

The State of Arizona has at all times been anxious to co-operate with the United States and the other States of the Colorado River basin in the development of the Colorado River along lines which would make provision for proper development and use within the State of Arizona, as well as the other States of the basin, of the waters of the stream.

In this connection I state that in Section 4 of the Boulder Canyon Project Act (45 Stat. 1057) Congress authorized the states of California, Arizona and Nevada to enter into an agreement which should provide:

(1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity,

(2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact,

(3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State,

(4) that the waters of the Gila River and its

tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin,

(5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which can not reasonably be applied to domestic and agricultural uses,

(6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact; and

that said agreement should take effect upon the ratification of the Colorado River compact by Arizona, California and Nevada.

I further state that Arizona, acting by and through its Colorado River Commission of which I, as Governor of Arizona, am an ex-officio member, has tender-

ed to California and Nevada an offer to enter into a compact with said states strictly pursuant to said provisions of the Boulder Canyon Project Act and to submit said compact, together with the Colorado River Compact, to the legislature of Arizona for ratification; and that the states of California and Nevada have declined and refused said tender and to enter into said compact with the state of Arizona.

Pending the negotiation of the proposed contract between the United States and the State of Arizona, mentioned in the affidavit of the Honorable Secretary of the Interior, filed herein, no work should be undertaken upon the Arizona side of the Colorado River in the construction of said Dam.

I further state that there is at present no duly authorized United States reclamation project in the State of Arizona for the irrigation of which the construction of Parker Dam would be advantageous to the United States, and I am advised and believe that the real purpose of said dam is to afford a reservoir for the desilting of the water of the Colorado River and for the diversion of the water so desilted into the Los Angeles Aqueduct for transmission to the Pacific Coast for municipal and domestic uses of various cities and towns, and I am advised that the Secretary of the Interior has no power or authority under the laws of Congress to construct Parker Dam for that purpose.

I am further advised that under the provisions of the Boulder Canyon Project Act California is restrict-

ed to the use of 4,400,000 acre-feet of water allocated to the lower basin states by Paragraph (a) of Article III of the Colorado River Compact and to one-half of the surplus waters of said stream; that notwithstanding the provisions of the Boulder Canyon Project Act, I am advised and believe that the Secretary of the Interior has entered into contracts with the state of California for the delivery to said state of 5,362,000 acre-feet of water from the Boulder Reservoir, which is 962,000 acre-feet more than authorized and permitted under the provisions of said Act.

Arizona tendered to the Secretary of the Interior a contract by the terms of which, if executed, there would be reserved to the state of Arizona 2,800,000 acre-feet of water stored in Boulder Reservoir for use in Arizona, and I am advised and upon such advice state, that under the provisions of said Boulder Canyon Project Act Arizona is entitled to have reserved for its use said quantity of water. That the Secretary of the Interior declined to enter into said contract for the reason that it was not acceptable to the other states within the Colorado River Basin, notwithstanding said Act does not require said Secretary, as a condition precedent to entering into contracts for the delivery of water from Boulder Reservoir, that the consent of said states be first obtained.

Being advised that steps were being taken by the Honorable Secretary of the Interior to commence work upon said Dam upon the Arizona side of the River, pending said negotiations, and being advised that said Parker Dam might not legally be placed in

the Colorado River without the consent of Arizona, and being further advised that as Governor of the State of Arizona I had the legal right to do so and was under a legal duty to protect the sovereignty and property right of the State of Arizona from such threatened trespass, as Governor of said State I did, as stated in the affidavit of the Honorable Secretary, proclaim martial law and seek to prevent said threatened trespass.

I was further advised that no provision is planned to be made for the passage of boats at said Dam or through or under the bridge which I am advised is intended to be built there, and that such construction will destroy the navigability of said River so long as said bridge or Dam remains therein.

I disclaim any purpose or attempt on the part of Arizona or of myself as Governor or otherwise to coerce the Honorable Secretary of the Interior into executing the proposed water delivery contract mentioned in his affidavit. I was and am advised and believe that Arizona is legally entitled to the use of the waters mentioned in said proposed contract.

I feel it my duty as Governor of Arizona to oppose and if possible prevent the proposed construction of the Parker Dam by and for the Metropolitan Water District of Southern California, unless and until its construction has been consented to by the State of Arizona.

In addition to the obstruction and destruction of

the navigability of said stream by the construction of said Dam, it is being built for the express purpose of permitting the Metropolitan Water District of Southern California to divert therefrom in excess of one million acre-feet of water per annum and carry the same to the coastal plain of California, out of the water shed of said stream so that the navigability of said stream would be thereby further impaired.

I am advised that by the terms of Article VI of the Treaty of Guadalupe Hidalgo the United States and its citizens have the right of free navigation of the Colorado River from the point where said river intersects the boundary between the United States and the United Mexican States to the Gulf of Lower California.

It appears from a report of the United States Department of Interior, Bureau of Reclamation, on the "Stream Flow of the Colorado River and its Tributaries", dated December, 1934, that the virgin flow of the Colorado River at the site of Boulder Dam over a period of thirty-seven years from 1897 to 1934 is 16,600,000 acre-feet.

That quantity of water converted into its equivalent in second-feet will provide a constant flow through Boulder Dam, for the regulation of the River and the improvement of navigation pursuant to the provisions of the Boulder Canyon Project Act, of approximately 25,000 second-feet, and provide a water highway capable of being navigated by the average size ocean-going freighters between Boulder Dam and the

Gulf of Lower California. This would give an outlet to the sea for Arizona cotton, copper (much of which is now trucked to ports at San Diego and Los Angeles for transshipment) timber and other products. The outlet to the sea thus provided would connect with transcontinental railroads at Needles, California, and Yuma, Arizona.

I am further advised that one of the considerations which the United States is to receive under the terms of its contract with the Metropolitan Water District of Southern California is the free use of 42,000 continuous hydro-electric power, which I am advised by electrical engineers of high standing, has a minimum switchboard value at Parker Dam of two mills per kilowatt hour, which, if capitalized, on the basis of five per cent return, is worth from twelve to seventeen millions dollars.

If the navigability of said stream is to be thus entirely destroyed, it is only equitable and fair that the State of Arizona and its citizens should receive from said stream some benefit for the surrender by the State of Arizona of its sovereign and property rights in said navigable stream and the advantages of an improved water highway to the sea.

Contrary to the statement made by the Honorable Secretary of the Interior in his said affidavit, I am advised and believe that construction of the Parker Dam and said proposed diversion of water to said Metropolitan Water District of Southern California will, if permitted, seriously jeopardize and directly

affect the rights of the State of Arizona in the waters of the Colorado River. I am advised and believe and, therefore, state that the rights and property of the State of Arizona and of its residents and citizens will be seriously and adversely affected by construction of Parker Dam.

A temporary injunction, should one be issued herein, will permit an invasion of the sovereignity and property rights of the State of Arizona by and for the Metropolitan Water District of Southern California, and will amount to the taking of property without due process of law.

While it is alleged in Paragraph IV of the Bill of Complaint that the Chief of Engineers of the United States Army has recommended the construction of said Parker Dam Project and said recommendation has received the approval of the Secretary of War, I am informed (said information being contained in a telegram from the Honorable Henry F. Ashurst, Senior United States Senator from the State of Arizona) and believe that the Chief of Engineers did not approve said project until January 4th, 1935, and that the Secretary of War did not approve it until January 5th, 1935, approximately two months after I, acting as Governor of the State of Arizona, declared martial law in the territory immediately adjacent to the site of the proposed Parker Dam and Reservoir and stopped construction of said Dam.

I further state that the Attorney General of Arizona has been advised by the Honorable Henry F.

Ashurst that Parker Dam was not included within the program of public works, which the Administrator of Public Works is authorized to undertake by section 202 of the National Industrial Recovery Act, until December 28th, 1933, some ten months after the date of the Metropolitan Water District contract pleaded in the Bill of Complaint.

I am advised that under the provisions of the Boulder Canyon Project Act, the Secretary of the Interior was authorized to construct only two dams across the bed of the Colorado River, one of which is the so-called Hoover or Boulder Dam. That the other dam that the Secretary of the Interior has been authorized to construct under the provisions of said Act, is that described in Section 1 of the Boulder Canyon Project Act as follows:

> "The Secretary of the Interior, subject to the terms of the Colorado River Compact hereinafter mentioned, is authorized to construct, operate and maintain . . . a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, *or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California.*" (Italics supplied).

The Laguna Dam mentioned in said Act is located downstream approximately seventy-five miles from the site of the Parker Dam and I am informed and

believe and upon such information state that the Secretary of the Interior has selected a point about five miles upstream from said Laguna Dam, or approximately seventy miles downstream from the Parker damsite, as the site at which he proposes to construct a diversion dam across the Colorado River for connecting said River with the main canal located entirely within the United States, which the said Boulder Canyon Project Act authorized the Secretary of the Interior to construct for the irrigation of the Imperial and Coachella Valleys in California.

I am further advised and upon such advice state that it is not the purpose of the Secretary of the Interior to use said Parker Dam for the purpose of connection with, or diverting water into, the so-called All American Canal, authorized as aforesaid to be built for the irrigation of said Valleys in California, and that said Parker Dam is another and different dam than that contemplated by Congress and which the Secretary of the Interior was authorized to build as a diversion dam in lieu of the existing Laguna Dam mentioned in said Act.

That, whereas the Boulder Canyon Project Act authorizes the Secretary to construct two dams across the Colorado River, he is proceeding to construct three, and the Parker Dam is not one of the two authorized.

I further state that the Colorado River at the site of the proposed Parker Dam and the reservoir to be created thereby was navigable in its ordinary condition and susceptible of being used in the customary

modes of trade and travel on water at and prior to the time Arizona was admitted to the Union as a State and has been at all times subsequent thereto.

IN WITNESS WHEREOF, I have hereunto set my hand this 30th day of January, 1935.

B. B. MOEUR

Subscribed and sworn to before me this 30th day of January, A. D. 1935.

ETHEL McMURCHIE,
Notary Public.

My commission expires January 21, 1936.
(Notarial Seal)

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SUPPORTING BRIEF

STATUTES INVOLVED

The federal statutes involved in this proceeding are:

The National Industrial Recovery Act (c 90, 48 Stat. 195) and particularly section 202 of said Act, the pertinent provisions of which are as follows:

> "The Administrator (the Federal Emergency Administrator of Public Works), under the direction of the President, shall prepare a comprehensive program of public works, which shall include, among other things, the following . . . (b) . . . construction of river and harbor improvements and flood control . . . *Provided*, That no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army."

The Reclamation Act (c. 1093, 32 Stat. 388), and acts supplementary thereto, and particularly Section 2 of the Act of February 21, 1911 (c. 141, 36 Stat. 926), reading:

> "In carrying out the provisions of the reclamation law the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water-users' associations, corporations, entrymen or water-users, for the construction or use of such reser-

voirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water-users' associations, corporations, entrymen or water users for impounding, delivering and carrying water for irrigation purposes; *Provided*, That the title to and management of the works so constructed shall be subject to the provisions of section 6 of the Act of June 17, 1902 (c. 1093, 32 Stat. 389) which provides: 'When the payments required by this chapter are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress'."

Section 4 of the Act of June 25, 1910 (c. 407, 36 Stat. 836) reading:

"No irrigation project shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States."

Section 9 of the Rivers and Harbors Appropria-

tion Act of 1899 (c. 425, 30 Stat. 1151) and Section 12 of said Act as amended by Section 2 of the Act of February 20, 1900 (c. 23, 31 Stat. 32), which we quote:

"Sec. 9. It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and the Secretary of War . . ."

"Sec. 12. Every person and every corporation that shall violate any of the provisions of sections 401, 403 and 404 of this chapter or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said sections, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States."

Paragraph 7 of Section 20 of the Act of June 20, 1910 (c. 310, 36 Stat. 557, 570) being the Enabling Act authorizing the admission of Arizona as a state and which reads as follows:

> "Seventh. That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress entitled 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands', approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or Supplementary thereto, to the same extent as if said State had remained a territory."

STATEMENT OF CASE

This is a suit in equity of original jurisdiction in this court whereby the United States seeks to enjoin the State of Arizona from interfering with the construction by the United States of the Parker Dam across the Colorado River, a navigable stream, at a point about one hundred and fifty miles down stream from Boulder Dam.

The Bill alleges that on September 10th, 1934, the United States, acting by and through the Federal Emergency Administrator of Public Works and the

Secretary of the Interior, commenced the construction of Parker Dam in the main stream of the Colorado River at the point above designated (Bill Par. I), pursuant to "the Acts of Congress authorizing the construction of the Parker Dam in the bed of the Colorado River at the place hereinafter set out" and pursuant to a contract dated February 10th, 1933, between the United States, "acting by and through the Secretary of the Interior" and the Metropolitan Water District of Southern California, a California public corporation, under the terms of which the District agreed to advance to the United States not exceeding thirteen million dollars with which the United States obligated itself to construct, without cost to it, Parker Dam.

"This contract, among other things, provides that the District shall advance to the United States from time to time sums not to exceed $13,000,000, and the United States shall construct by means of such funds, pursuant to the provisions of the Reclamation Act (c. 1093, 32 Stat. 388), and Acts supplemental thereto, particularly the Act of March 4, 1921 (c. 161, 41 Stat. 1367, 1404), the Act of April 21, 1904 (c. 1402, 33 Stat. 189, 224), and the Act of December 1, 1928 (c. 42, 45 Stat. 1057), the project referred to therein and in this bill of complaint as Parker Dam, for the purpose of controlling floods of the Colorado River and its tributaries below Hoover (Boulder) Dam, *improving and regulating navigation* (Italics supplied), providing for the protection and reclamation of the lands within the Colorado River Indian Reservation in Arizona and public lands of the United States in

Arizona, and for the re-regulation of the waters discharged in the operation of Hoover (Boulder) Dam, required by the provisions of the Boulder Canyon Project Act (c. 42, 45 Stat. 1057)." (Bill Comp. Par. X p. 12).

Under said contract various advantages accrue to the United States for use in its proprietary capacity, particularly the reclamation of public lands, and for the reclamation of lands in the Colorado River Indian Reservation.

An analysis of the contract showing the benefits to accrue to, and the obligations assumed by, the contracting parties will be found on pages 27 to 29 of this brief.

The consent of Arizona to construct Parker Dam in the bed of the River lying east of the thread of the stream and to submerge, by the reservoir to be created by said dam, lands of Arizona lying between the thread of the stream and its east mean high-water line, and extending from the dam twenty miles up stream, not having been obtained, the State of Arizona on November 7, 1934, sent telegraphic advice to the Secretary of the Interior and engineer in charge of construction of the dam that the work could not go forward without the State's consent. The Secretary of the Interior, nevertheless, persisting in the prosecution of the work, the Governor of Arizona on November 10, 1934, issued a proclamation declaring martial law in the area immediately adjacent to the dam location on Arizona's side of the Colorado River and sent the state militia to prevent

trespass and the construction of said dam upon Arizona's property. This suit was, therefore, brought in the Supreme Court for the purpose of enjoining the State from interfering with the construction of said dam.

QUESTIONS PRESENTED

1. Has the Federal Emergency Administrator of Public Works authority under the National Industrial Recovery Act, and particularly Section 202 (c. 90, 48 Stat. 195), to participate on behalf of the United States in the construction of Parker Dam across the Colorado River, a navigable stream, (the expenditure of no public money being involved) without the consent of Congress under the provisions of Section 9 of the Act of March 3, 1899 (30 Stat. 1151)?

2. Has the Secretary of the Interior authority under the laws of Congress to enter into a contract on behalf of the United States with a public corporation organized under the laws of a state, by the terms of which the United States obligates itself to build Parker Dam on the Arizona side of the bed of the Colorado River without the consent of that State, for the purpose of:

(a) "Improving and regulating navigation"; and

(b) Reclaiming public lands and lands in the Colorado River Indian Reservation?

FOREWORD

Arizona sincerely regrets a controversy has arisen between it and the Federal Government. This court may well take judicial knowledge that this suit has its genesis in the ten-year disagreement between Arizona and California over an equitable division of the beneficial use of the waters of the main stream of the Colorado River along its course where it constitutes the boundary between the two states. The Constitution provides for the settlement of conflicting interests or claims between states by compacts or agreements with the consent and approval of Congress. The United States may, likewise, enter into compacts with the several states.

When it became necessary for the Metropolitan Water District of Southern California to construct a dam across the Colorado River in order to divert water to supply the domestic needs of the inhabitants of various cities and communities in Southern California, it would have been more in keeping with the proprieties and amenities which it is the custom of states to observe in their intercourse to have endeavored in good faith to obtain Arizona's consent to construct the Parker Dam rather than pursue a course of circumvention which has embroiled the United States in a controversy in which it should have no other than a solicitious interest. And the same thing may, with equal propriety, be said with reference to the United States in proceeding to construct the dam for reclamation of public and Indian lands.

Likewise, it might well be said that Arizona has at all times had available its remedy in the ordinary and orderly course of judicial proceedings and it was not necessary for it to forcibly stop construction, whatever it might have thought of the wisdom of such a course or of its rights in the premises.

ARGUMENT

Summary

1. Arizona owns in its sovereign capacity the east half of the bed of the Colorado River, a navigable stream, where Parker Dam is proposed to be constructed, subject only to the paramount right of the United States to maintain and improve navigation in interstate and foreign commerce.

2. The right of the United States to occupy and use the beds of navigable streams without the consent of the state having jurisdiction is found in the commerce clause of the Constitution and is restricted to activities undertaken by the Government primarily with the intent to regulate interstate commerce and improve navigation. Neither Congress, the United States nor any of its executive officers can extend the authority of the national Government under the commerce clause to reclaim public and Indian lands under the guise of improving navigation.

3. No dam or other structure which will obstruct

navigation can be erected in any navigable waters of a state by any person without the state's consent, nor by the United States, except for the purpose and with the intent of regulating and improving navigation.

4. It appearing upon the face of the bill of complaint and the affidavits of Commissioner of Reclamation Mead and Secretary of Interior Ickes in support of application for temporary restraining order that the Metropolitan Water District of Southern California is the real party in interest, the dam cannot be constructed without the concurrent consent of Congress and Arizona.

5. It appearing upon the face of the complaint that the construction of the dam is not positively related to the improvement of navigation, but, on the contrary, is an insuperable obstruction, not even the United States itself has authority to build it without the consent of Arizona.

6. The Secretary of the Interior has no power, constitutional or otherwise, to obligate the United States by contract with an individual or corporation with relation to the governmental functions of the United States or obliging it to act or not to act in its sovereign capacity.

7. The United States, in exercising its rights under the commerce clause to regulate and improve navigation, acts in its governmental and sovereign capacity.

Therefore, that portion of the contract between the United States, acting by and through the Secretary of the Interior, and the Metropolitan Water District of Southern California, by which it was sought to obligate the United States to construct the Parker Dam for the purpose of *"improving and regulating navigation"* (a governmental function), is void and imposes no obligation upon the United States.

8. As the United States acts in its proprietary capacity, as distinguished from its governmental, in the reclamation of arid lands, it cannot appropriate any property of the State of Arizona to such a use without the state's consent.

I

ARIZONA OWNS IN ITS SOVEREIGN CAPACITY THE EAST HALF OF BED OF COLORADO RIVER.

United States v. Holt State Bank, 270 U. S. 49, 54, 70 L. Ed. 465, 468.

The right of the United States in the navigable waters within the several states is "limited to the control thereof for the purposes of navigation".

Port of Seattle v. Oregon and Washington R. C., 255 U. S. 56, 63, 65 L. Ed. 500, 506, 41 Sup. Ct. Rep. 237.

"And while Congress, in the exercise of this

> power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, United States v. Chandler-Dunbar Water Power Co. 229 U. S. 62, 57 L. Ed. 1075, 33 Sup. Ct. Rep. 667, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end."

United States v. River Rouge Imp. Co., 269 U. S. 411, 419, 70 L. Ed. 339, 345.

The same principle is applicable to lands of a state in the bed of a navigable stream.

As the bill of complaint (Par. II) alleges that the east and west abutments of the dam will rest on the Arizona and California banks of the river, will be of steel and concrete construction, and will extend across the river and raise the water level on the upstream side of the dam seventy-two feet higher than the level on the downstream side, it appears on the face of the complaint that the dam is not an aid to or an improvement of navigation; that, on the contrary, it will be an absolute and insuperable obstacle to navigation between points above and below the dam. Therefore, it can have no "positive relation to the control of navigation" other than to obstruct or destroy it, which is not within the scope of the commerce clause and may not be done without the consent of the state having jurisdiction.

Therefore, the United States, even though acting in its governmental capacity, cannot constitutionally destroy the navigability of a stream unless it, perhaps, be for the purpose of improving navigability of some other related stream.

II

CONCURRENT CONSENT OF CONGRESS AND STATE IS A PREREQUISITE TO CONSTRUCTION OF A DAM.

In *Pigeon River Improvement Slide and B. Co. v. Cox*, 291 U. S. 138, 159, 78 L. Ed. 695, 704, this court said:

> "Where, under section 9 of the Act of March 3, 1899, the consent of Congress is required for the erection of structures in or over navigable waters not lying wholly within a State, 'the act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State;' it merely subjects the exercise of the right 'to the further condition of getting from Congress consent to action upon the grant.' International Bridge Co. v. New York, 254 U.S. 126, 133, 65 L. Ed. 176, 184, 41 S. Ct. 56."

Pigeon River, with which the court was dealing, formed the international boundary between the State of Minnesota and the Province of Ontario and in that respect presents the same situation as does the Colorado River where it is the boundary between Arizona

and California.

Section 12 of the Rivers and Harbors Appropriation Act of 1899 as amended by Section 2 of the Act of February 20th, 1900, supra, makes it a criminal offense for anyone to construct a dam across a navigable river without the consent of Congress. If this court should hold that Congress has not consented and its consent is necessary to the construction of the Parker Dam, then the contract between the Secretary of the Interior and the Water District is void as providing for the doing of an act which is made a crime.

> "Moreover, erection of the bridge without state consent would constitute a direct evasion of the federal statute above quoted, violation of which is made a crime. Under elementary principles, any contract entered into by the city in violation of such a penal statute renders the contract void. See Berka v. Woodward, 125 Cal. 119, 126, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592, 601, 229 P. 1020."

Southlands Company v. City of San Diego, (Supreme Ct. Cal.) 297 P. 521, 526.

As a general rule, all contracts or agreements which involve or have for their object the violation of law, are illegal. See 13 C. J. 411, Note 99, where many cases from this court, as well as from state courts, are cited.

III

ADMINISTRATOR OF PUBLIC WORKS IS WITHOUT AUTHORITY TO BUILD PARKER DAM IN THE ABSENCE OF A SHOWING OF PRIOR APPROVAL OF CONGRESS.

In Paragraph I of the bill it is alleged that the United States, acting through the Federal Emergency Administrator of Public Works as well as the Secretary of the Interior, is constructing the dam, while in Paragraph III of the bill it is alleged that the Parker Dam project has been included by the Federal Emergency Administrator of Public Works in the comprehensive program of public works referred to and authorized by Section 202 of the National Industrial Recovery Act, supra, and that (Bill Par. IV) the Chief of Engineers of the Army has recommended its construction and his recommendation has been approved by the Secretary of War.

It is not alleged that any public funds are being used by the Public Works Administrator in such construction and it appears affirmatively from the complaint that the work is being done without cost to the Federal Government and with funds furnished by the Metropolitan Water District. When that situation is considered in connection with the fact that the contract between the Secretary of the Interior and the Water District is dated February 10th, 1933, whereas the National Industrial Recovery Act, which created the office of Public Works Administrator, was not approved until June 16th, 1933, it is somewhat diffi-

cult to understand what the Administrator's functions or his authority in the premises may be.

Under the proviso in Section 202 of the National Industrial Recovery Act, supra, the Administrator is prohibited from carrying out any river or harbor improvement works unless "they shall have heretofore or hereafter been adopted by the Congress *or* recommended by the Chief of Engineers of the United States Army". While the express language of the proviso, in the absence of a consideration of the history of river and harbor improvement legislation, might be read in the alternative, that is, to require that the proposed improvements must receive the adoption of *either* Congress or of the Chief of Engineers, such a construction is illogical and untenable, unless, indeed, Congress by section 202 intended to waive in favor of the Federal Administrator of Public Works the necessity of obtaining its consent under the provisions of Sections 9 and 10 of the Act of 1899 to the construction of dams, bridges and other structures in the navigable waters of the United States. There is no need of such a construction in order to give full effect to the proviso.

In *Wisconsin v. Illinois*, 278 U. S. 399, 417, 73 L. Ed. 426, 434, this court reconciled the apparent conflicts between Sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, and held that the express consent of Congress, as well as the approval of the Chief of Engineers and the Secretary of War, is necessary to authorize the building of a "bridge, dam, dike or causeway" over or in any navigable wa-

ters of the United States; that the approval of the Chief of Engineers and the Secretary of War without the express consent of Congress, is sufficient authorization to place in navigable waters any of the structures mentioned in Section 10 which do not unreasonably obstruct navigation. Undoubtedly, Congress, in enacting the proviso contained in Section 202 of the National Industrial Recovery Act had in mind the provisions of Sections 9 and 10 of the Act of 1899 and the construction placed thereon by the Supreme Court in the *Wisconsin v. Illinois* case; and intended, under the proviso, that the Administrator of Public Works could only undertake the construction of such river and harbor improvements of the class mentioned in Section 9 as had theretofore or might thereafter be adopted by Congress, but that he was at liberty to proceed to construct, without the consent of Congress, any river and harbor improvement involving structures of the character mentioned in Section 10, and which did not unreasonably obstruct navigation and which had theretofore or might thereafter be recommended by the Chief of Engineers of the Army. Such a construction brings the proviso of Section 202 in harmony with the long-established policy of Congress in relation to control of the navigable waters of the United States. Any other construction would necessarily imply a delegation by Congress of all of its authority and control over river and harbor improvements to the Administrator of Public Works and to the Chief of Engineers of the Army, which is not to be presumed and must be clearly expressed. It is doubtful if Congress may so surrender or delegate its governmental functions over navigable waters.

IV

UNITED STATES HAS NO CONSTITUTIONAL AUTHORITY TO CONSTRUCT PARKER DAM FOR RECLAMATION OF PUBLIC AND INDIAN LANDS WITHOUT CONSENT OF ARIZONA.

The bill of complaint sets up the authority of the Secretary of the Interior, and through him that of the United States, to build Parker Dam without Arizona's consent as being founded under the Reclamation Act and acts supplemental thereto, the Boulder Canyon Project Act and various acts of Congress approved subsequent to 1865 and including 1910, providing for the irrigation of lands in the Colorado River Indian Reservation and making appropriations therefor. It also relies upon paragraph 7 of section 20 of the Act of June 20, 1910 (c. 310, 36 Stat. 557, 570) authorizing the admission of Arizona as a state, which, paraphrased, reads as follows:

> "Seventh: That there be and are reserved to the United States, with full acquiescence of the state, all rights and powers for the carrying out of the provisions of the Reclamation Act and amendatory and supplemental acts to the same extent as if said state had remained a territory."

Also, at the beginning of Paragraph X of the bill of complaint, it is alleged that "for the purpose of carrying out the provisions of the acts of Congress authorizing the construction of Parker Dam in the bed of the Colorado River at the place hereinafter set out

and pursuant to the paramount constitutional powers of the United States", the contract with the Metropolitan Water District was entered into. We have found no act of Congress directly or indirectly authorizing the construction, or even so much as mentioning, Parker Dam.

The Boulder Canyon Project Act only authorizes the Secretary of the Interior to construct the Hoover Dam and "a suitable diversion dam, . . . if deemed advisable by him upon engineering and economic conditions" to serve as a diversion dam for the All American Canal for the irrigation of Imperial and Coachella Valleys in California.

In none of the acts of Congress pleaded, nor in any that we have been able to find, is the Secretary of the Interior given any general power to construct river and harbor improvements, and we are confident that no such law exists. The Secretary's authority for entering into the pleaded contract with the Metropolitan Water District must be found, if at all, in section 20 the Act of February 21, 1911, known as the "Warren Act", supra, by which he is authorized to co-operate with other persons, corporations and associations in the construction of such reservoirs and canals as may be advantageously used by the Government in carrying out the provisions of the Reclamation Law.

In *McLean v. Truckee-Carson Irrigation District*, 245 P. 285, 288, 49 Nev. 278, a contract between the United States, acting through the Secretary of Interior, and the Truckee-Carson Irrigation District for

the construction of a canal for the irrigation of lands within the district, was held valid. However, the district was formed to include and to be a part of the administrative authority of the United States Newlands Reclamation Project, authorized Act of Congress of June 17th, 1902.

Congress has not authorized construction of the Parker-Gila project and it now has no more than a nebulous existence.

Neither does the complaint allege that the Parker-Gila project has "been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States", which, under the provisions of section 4 of an Act of June 25th, 1910, (c. 407, 36 Stat. 836) is necessary before any irrigation project can be begun under the Reclamation Act.

It would seem that in the absence of an Act of Congress or a recommendation of the Secretary of the Interior, approved by *direct order* of the President, the Secretary has no power or authority to begin the construction of the Parker-Gila project, and any co-operative contract entered into by him, which otherwise might be authorized by the act of February 21, 1911, is without authority of law.

Therefore, the Secretary must base his entire authority under one or more of the various acts cited by him providing for the irrigation of lands of the Colorado River Indian Reservation and making appropriation therefor, by none of which is he authorized to en-

ter into a co-operative contract with others for the construction of works which may be advantageously used by the government in the irrigation of such lands.

V

UNITED STATES, IN THE RECLAMATION OF PUBLIC LANDS, ACTS IN ITS PROPRIETARY CAPACITY.

As heretofore stated, the right of the United States in the navigable waters of a state are limited to the regulation and improvement of navigation in interstate and foreign commerce. It, therefore, has no sovereign rights in the stream for the purpose of reclamation of public or Indian lands, and in those activities it acts in the capacity of a proprietor of its own lands and as a guardian or trustee of Indian lands.

The following is quoted from the opinion of the Circuit Court of the District of Idaho in *Twin Falls Canal Co. v. Foote*, 192 Fed. 583, 594:

> "In prosecuting such an enterprise (reclamation project), however, it (the United States) is not primarily performing a governmental, or, strictly speaking, even a public function, but is promoting its proprietary interests. Such advantage as arises therefrom to the people at large is material and not governmental, and is only such as might indirectly accrue to the public from the reclamation of an equal amount of land through

private enterprise. Kansas v. Colorado, 206 U. S. 46, 92, 27 Sup. Ct. 655, 51 L. Ed. 956; United States v. Hanson, 167 Fed. 881, 93 C. C. A. 371; United States v. Burley 172 Fed. 615, Id., 179 Fed. 1, 102 C. C. A. 429."

VI

UNITED STATES CAN ASSERT NO RIGHTS UNDER PARAGRAPH 7 OF SECTION 20 OF THE ACT ADMITTING ARIZONA AS A STATE.

In paragraph IX of the Bill of Complaint the United States has pleaded as one of its sources of authority paragraph 7 of Section 20 of the Enabling Act providing for the formation of Constitutions by Arizona and New Mexico and their admission to the Union as states, quoted on Page 4, this brief.

Any limitation imposed by Congress as a condition to admission which sought to have the effect of limiting the state's sovereign title to the beds or waters of its navigable streams, or to restrict its common law right to regulate navigation, was void and of no effect, after Arizona ceased to be a territory and became a state.

In *Coyle v. Smith*, 221, U. S. 559, 572, 55 L. Ed. 853, 860, it was held that when a new state is admitted to the Union, it becomes vested by the mere fact of admission with all the sovereignty possessed by the thirteen original states after the adoption of the Constitution of the United States. The court used the follow-

ing language:

"The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignity and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission."

The rule is well stated in 59 C. J. 68, 69, where all the cases are collected. It is stated that in determining the validity of conditions as fixed by Congress in the admission of states, there are three to be distinguished, the third of which is:

"third, compacts or affirmative legislation which operates to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power. . . . "as to the third, however, there is no power in congress to prescribe any such conditions, operating to limit in the future the legislative power of a new state over matters in their nature confided exclusively to the states as a part of their sovereign powers; their equality with the older states cannot be impaired in such matters by the provisions of enabling acts or conditions otherwise im-

posed by congress upon, and at the time of, admission."

Pursuant to the provisions of the Enabling Act, Arizona incorporated paragraph 7 of section 20 of that act in its Constitution as section 10 of Article 20. However, on June 7th, 1927, an amendment to the Arizona Constitution repealing that clause became effective.

As the original thirteen states had the sovereign right to regulate navigation and to prohibit and remove obstructions in navigable waters, the provision in the Enabling Act relied upon by the United States had no effect to limit the future powers of the State in that respect.

In paragraph VIII of the Bill it is stated that the construction of the Boulder Dam and the Parker Dam pertain to the same general public purpose as expressed by Congress in enacting legislation for the regulation, control and improvement of the Colorado River system, including the regulation of the Colorado River respecting navigation.

Probably the purpose of that allegation is to bring the construction of the Parker Dam within the rule or exception recognized by this Court in *Pigeon River Improv. S. & B. Co. v. Cox*, 291 U. S. 138, 159, 78 L. Ed. 695-704.

In that case the consent of Congress had been obtained by a private corporation to construct works on

a designated portion of the Pigeon River so as to make it navigable, and it was held that that carried with it Congress' implied authority to construct appropriate improvements in other portions of the river without which the works expressly authorized would be useless.

Congress expressly authorized the construction of the Boulder reservoir in the Colorado River at head of navigation for the declared purpose of improving downstream navigation. This Court in *Arizona v. California*, 283 U. S. 423, 453, 75 L. Ed. 1154, 1164, took judicial knowledge of the fact that the Colorado River is navigable and had in fact been navigated in interstate commerce from the Gulf of California to as far north as the Virgin River, a short distance above Boulder Dam, and the bill so alleges.

The Secretary in this case must show the express or necessarily implied congressional authority, for he is acting in a representative capacity, whereas the corporation in the Pigeon River case had no such burden and neither the United States nor the State of Minnesota raised the point, and the river had actually been made navigable. The Parker Dam, on the contrary, is to be constructed in a section of the stream for the improvement of which Congress authorized the building of the Boulder Dam. Instead of further improving navigation, as was the case on the Pigeon River, Parker Dam is an absolute and unsurmountable obstruction to navigation between points above and below its site. The Secretary of the Interior and Public Works Administrator, without

the consent of Congress, propose to destroy the navigability of the very section of the river which Congress is now improving at an expenditure of $165,000,000 under the Boulder Canyon Project Act.

VII.

IT APPEARS UPON THE FACE OF THE COMPLAINT THAT THE UNITED STATES IS NOT THE REAL PARTY IN INTEREST.

It clearly appears from the reading of the Bill that the Metropolitan Water District of Southern California is the real party in interest.

The contract, as disclosed by the Bill, particularly Paragraph X, is most extraordinary and is such an agreement as no reasonable man occupying the situation of the Water District, except for its problems in constructing, the dam across a navigable stream, would have entered into. It is quite true that enormous advantages accrue to the United States under the contract, but that is no justification in law for trespassing upon property held by Arizona as a sovereign or for appropriating it to the use of the United States and the Metropolitan Water District without Arizona's consent.

The affidavit of the Commissioner of Reclamation, Mead, on file in this cause in support of the application for temporary injunction, shows that on the 25th day of August, 1934, the United States sublet to Six Companies Inc., a California corpora-

tion, construction of the Parker Dam pursuant to the terms of the Government's contract with the Metropolitan Water District of Southern California. It is not to be presumed that the Government is in the contracting business for profit. It is acting simply as a medium of passage from the Metropolitan Water District to the Six Companies Inc. of the money which it receives under the contract to defray the cost of construction.

While enormous advantages accrue to the United States in its proprietary capacity under the alleged contract with the Metropolitan Water District, it is all too apparent, and regrettably so, that the sole and only purpose of the Metropolitan Water District in procuring the contract with the United States through the Secretary of the Interior was that it might thereby interpose the power and authority of the Federal Government as a stop-gap between it and the State of Arizona, and strengthen its position in its effort to build Parker Dam without the concurrent consent of Congress and Arizona.

We give a brief analysis of the provisions of the contract as they appear in Paragraph X:

Obligations Assumed by United States

1. To construct Parker Dam with money advanced by the District from time to time, not exceeding $13,000,000, for the purpose of:

(a) Controlling floods of the Colorado River and its tributaries;

(b) *Improving* and *regulating navigation;*

(c) Providing for the protection and reclamation of the lands in the Colorado River Indian Reservation and public lands in Arizona;

(d) For the re-regulation of the water discharged at Boulder Dam.

2. Operation and maintenance of the reservoir, dam and outlet works.

Advantages Accruing to the United States

1. Use without cost of 42,500 continuous hydroelectric horsepower for irrigation and drainage of Indian lands and public lands in the proposed Parker-Gila Reclamation Project (of a value of from $12,000,000 to $17,000,000, Governor Moeur's affidavit).

2. Right of transmission of power over Water District's lines from Boulder Dam to Parker Dam at cost;

3. Right to use Parker Dam and reservoir as diversion facilities for reclamation of Indian and public lands in Arizona or California;

4. Right to divert water from the Colorado River;

5. Title and ownership of the Dam costing $13,000,000;

Rights Accruing to the Water District

1. 42,500 continuous hydro-electric horsepower;

2. The right to divert water from the dam and reservoir created thereby.

3. Relief from cost of operation and maintenance.

It is clear that the Metropolitan Water District anticipated some very valuable considerations which are not expressed in the contract in return for surrendering title to the government of a structure to cost $13,000,000 and granting the government the right to free use of 42,500 continuous horsepower of hydro-electric energy of a value of more than $12,000,000.

That United States, as a proprietor or trustee, will not reap the advantages of its contract is beside the question. It has no right under the Constitution to trade either its own or a state's sovereign right to preserve navigation in return for facilities for irrigating public and Indian lands.

VIII

SECRETARY OF THE INTERIOR HAS NO AUTHORITY TO BIND UNITED STATES IN EXERCISE OF ITS GOVERNMENTAL FUNCTIONS.

The United States in exercising its power of regu-

lating and improving navigation acts strictly within the scope of the governmental functions delegated to it by the States under the commerce clause of the Constitution. It is a principle of constitutional law that neither a State nor the Federal government can barter away or contract to exercise or not to exercise its governmental functions, including the right to regulate and improve navigation, except by treaty with a foreign nation.

IX

APPROVAL OF CONSTRUCTION OF PARKER DAM BY CHIEF OF ENGINEERS AND SECRETARY OF WAR NOT EQUIVALENT TO CONSENT OF CONGRESS

The license or permission of the Secretary of War for the construction of Parker Dam amounts only to a declaration by such officer that in his opinion the proposed structure is not an unreasonable obstruction to navigation and will not interfere with, nor be detrimental to, navigation, and is not equivalent to a positive declaration by authority of Congress that the licensee may build the structure without first obtaining the consent of the owner of the submerged land on which it is to be built.

Cobb v. Lincoln Park, 202 Ill. 427, 67 N. E. 5.

Truly, Congress could not, nor did it so intend, to authorize the Federal Emergency Administrator of

Public Works and the Secretary of Interior, with the concurrence of the Chief of Engineers of the Army, or the United States, acting by or through either one or both of those executive officers, to trespass upon and to confiscate the property or to invade the rights of the State of Arizona under any conditions whatsoever, nor the property or rights of any individuals or corporations except according to due process of law.

The "normal power of the Secretary of War under Section 10 of the Act of March 3, 1899, is to maintain the navigable capacity" of navigable waters within his jurisdiction and "not to restrict it or destroy it."

Wisconsin v. Illinois, 278, U. S. 399, 417, 73 L. Ed. 426, 434.

The same principle naturally applies to the very limited powers vested in the Administrator of Public Works and the Chief of Engineers under the proviso of Section 202 of the National Industrial Recovery Act.

X

UNITED STATES WILL NOT SUFFER DAMAGE IF RESTRAINING ORDER IS NOT GRANTED

The affidavits of Honorable Elwood Mead, Commissioner of Reclamation, and Honorable Harold L. Ickes, Secretary of the Interior, filed in this court in support of the application of the United States for

a temporary restraining order, when read in connection with the bill of complaint, affirmatively show that the United States will not suffer any damage, irreparable or otherwise, by reason of the matters and things alleged in the bill of complaint should a temporary restraining order or a permanent injunction not issue, for the reason that the bill and particularly Paragraph X thereof, affirmatively shows that the United States is not obligated under the terms of said contract with the Metropolitan Water District to lay out or expend any funds whatsoever in the construction of Parker Dam other than the funds from time to time advanced to it by said Water District, and it further affirmatively appears from said paragraph of the bill that said contract provides that the United States shall not contribute anything to the cost of the dam.

In the affidavits of the Commissioner of Reclamation and the Secretary of the Interior supporting the application for temporary restraining order, it is averred, among other things, that many advantages and benefits will accrue to the State of Arizona by the construction of Parker Dam and that damage to the state will not be great.

The Government is evidently seeking to conversely apply the equitable principle that where a *plaintiff* seeks an injunction to restrain the doing of an act which will be of slight damage him and of great benefit to the defendant or the public, the court, upon a balancing of the equities, may, in its judicial dis-

cretion, deny injunctive or other equitable relief, leaving him to his remedy at law for damage.

The distinction is that the defendant in this case is seeking no equitable relief and is only pursuing its common law right to forcibly repel trespass upon its property. In such case, the damage which may result by reason of the threatened trespass is no element in the measure of its right to repel. It is, indeed, a new principle of equity which the plaintiff seeks to invoke, namely, the right to appropriate the defendant's property to its own use upon the theory that it will redound to its good and advantage and not seriously damage it.

In this case, the United States being the threatening trespasser and not amenable to suit for damages in tort, the defendant would have no remedy at law on account of the trespass.

From the affidavits of the Commissioner of Reclamation and the Secretary of the Interior it would seem they have abandoned the fictitious theory of improving navigation, for it is not mentioned. It would appear they are commendably unwilling to take oath to the allegations of the bill pertaining to navigation.

The bill alleges that a reservoir extending twenty miles upstream from the dam will be created. This court may take judicial knowledge of the geographical and physical features of the United States. From such knowledge it knows that the Parker reservoir will submerge several thousand acres of land

owned by Arizona between the mean low and mean high water lines on the east side of the river, which with a regulated flow through Boulder Dam would become valuable for agriculture.

XI

SIGNIFICANCE OF BELATED APPROVAL OF PARKER DAM AS RIVER AND HARBOR PROJECT

It will be noted from the affidavit of Honorable B. B. Moeur, Governor of the State of Arizona, that the Chief of Engineers of the United States Army and the Secretary of War did not approve the construction of the Parker Dam until January 4th and January 5th, 1935, respectively, which was approximately four months after it is alleged the construction of the dam was commenced and two months after Arizona had forcibly stopped construction on the east side of the River.

The Secretary of the Interior has no general power to improve navigation and he has not been specifically authorized to construct Parker Dam. The Administrator of Public Works is expressly prohibited by the proviso in Section 202 of the National Industrial Recovery Act from undertaking river and harbor improvements without the prior approval of Congress or the Chief of Engineers.

Presumably, no public official in the execution of his duties will knowingly exceed his authority or vio-

late the positive provisions of a statute. Therefore, we must presume that neither the present incumbent's predecessor in the office of the Secretary of the Interior in executing the contract with the Metropolitan Water District, nor Mr. Ickes in either of his dual capacities as Secretary of the Interior and Administrator of Public Works in undertaking the dam's construction, had in mind the improving of the Colorado River for navigation. When it is considered that the approval of Parker Dam by the Chief of Engineers of the Army and the Secretary of War was not obtained until the 4th and 5th of January, 1935, respectively, we may further presume that it was not until then that the idea of improving navigation occurred to either the Secretary of the Interior or Administrator of Public Works. And when it is further considered that this suit was filed nine days after the approval of the dam by the Chief of Engineers and the Secretary of War, we are constrained to further presume that such approval was obtained for the purpose of laying the foundation for this suit and without any relation to river improvement.

It further appears from the affidavit of the Governor of Arizona that the Administrator of Public Works did not include Parker Dam in his program of public works until December 28th, 1933, more than ten months after the date of the contract between the Secretary of the Interior and the Water District.

SUMMATION

In conclusion we advance the proposition:

That unless upon the facts stated in the Bill of Complaint and the law applicable thereto it appears that Parker Dam is being constructed by the United States, acting in its sovereign and governmental capacity, for the purpose of regulating and improving navigation of the Colorado River in interstate and foreign commerce and that said dam has some positive relation thereto, this suit must fail.

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February, 1935.